FILE COPY

Supreme Court, U. S.
FILED
JUL 20 1935
CHARLES ELMORE CROPLEY
CLERK

No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

RAY KEITH ATKINSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Specifications of errors to be urged	6
Reasons for granting the writ	7
Appendix	14

CITATIONS

Cases:	
Miller v. *United States*, No. 342, October Term, 1934	6, 7, 10
United States v. *Stever*, 222 U. S. 167	9
Statutes:	
War Risk Insurance Act, as amended:	
Sec. 13 (May 20, 1918, c. 77, 40 Stat. 555)	14
Sec. 18 (Dec. 24, 1919, c. 16, 41 Stat. 371, 376)	10, 15
Sec. 20 (Oct. 6, 1917, c. 105, 40 Stat. 398, 400)	15
Sec. 400 (Oct. 6, 1917, c. 105, 40 Stat. 398, 409)	15
Sec. 402 (June 25, 1918, c. 104, sec. 21, 40 Stat. 609, 615)	16
Sec. 403 (Oct. 6, 1917, c. 105, 40 Stat. 398, 410)	11, 16
Sec. 404 (Oct. 6, 1917, c. 105, 40 Stat. 398, 410)	17
United States Code, Sup. VII, Title 38:	
Sec. 443	11
Sec. 511	10, 11, 13
Sec. 512	8
Sec. 512(a)	13
Miscellaneous:	
Veterans' Administration Regulations:	
3121	17
3122	13, 17
3140	7
Report of Administrator of Veterans' Affairs for 1934, p. 29	13
H. Rep. No. 130, 65th Cong., 1st Sess., part 3, p. 12	10
Amrhein's *The Liberalization of the Life Insurance Contract*, 1933, pp. 282–283, 361–363 (pars. (8) and (16))	12
Handy Guide to Standard and Special Contracts, 1934 (The Spectator Company)	12

In the Supreme Court of the United States

OCTOBER TERM 1935

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

RAY KEITH ATKINSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above entitled case March 27, 1935.

OPINIONS BELOW

The District Court for the Western District of Texas rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 564.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 27, 1935. A petition for re-

hearing was denied April 20, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there is any authority in law for including in contracts of Government (converted) life insurance against death or total permanent disability, a provision that "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability." [1]

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are contained in the Appendix, *infra*, pp. 14–18.

STATEMENT

Ray Keith Atkinson, the respondent, brought this suit in the District Court of the United States for the Western District of Texas to recover total permanent disability benefits under a policy of Government life insurance, together with the premiums paid by him since the date of commencement of the disability alleged.

The plaintiff alleged in his first amended petition, filed May 2, 1934, that on or about July 1, 1927, a war-risk insurance policy in the sum of $10,000

[1] While this question was not specifically raised in the trial court, it formed the basis of the decision of the Circuit Court of Appeals, as indicated at pp. 5–6 *infra*, of the Statement, and consequently may be considered here.

previously issued to him by the defendant was converted upon his application into a certain form of Government life insurance which, on June 1, 1932, was in turn converted into another form of such insurance, and that he has kept the insurance in force at all times by payment of premiums. He further alleged that by reason of loss of hearing in both ears his insurance matured on January 1, 1928, or, at the latest, at some time prior to the filing of his claim for insurance benefits on or about December 10, 1932. His claim of permanent total disability was based, in the alternative, upon two distinct definitions thereof contained in separate clauses in both policies of Government life insurance which had been issued to him, to wit, paragraph 11 which defined total permanent disability as an "impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which graph 11, which defined total permanent disability render it reasonably certain that the total disability will continue throughout the life of the disabled person", and paragraph 11 (a) which provides that "Without prejudice to any other cause of disability, the permanent * * * loss of hearing of both ears * * * shall be deemed to be total permanent disability; * * *." (R. 1–4, 29.)

The defendant's amended answer contained a general demurrer, a special exception on jurisdic-

tional grounds as to a portion of the claim, and a general denial. (R. 6–7.) By leave of court the defendant later filed a trial amendment to its first amended answer, setting up fraud in the reinstatement in June 1921 of the original war risk insurance, which it was alleged had lapsed for nonpayment of premiums upon the plaintiff's discharge from the Army. Fraud was also alleged in the conversion to Government life insurance in May 1927 of the reinstated war risk insurance. (R. 8–10.)

At the trial of the case before a jury evidence was adduced that the plaintiff became, to all practical intents and purposes, totally and permanently deaf without the aid of earphones, between January 1, 1928, and December 10, 1932 (R. 96, 102) but could understand conversation by combining the use of such phones with lip reading (R. 44). It also appeared that he was a college graduate (R. 45), had taught school (R. 46) and was a capable and competent architectural draftsman (R. 46, 54); that he had worked in an architect's office for many years prior to June or July, 1928, at a substantial salary (R. 43) and since then has followed his profession intermittently when work was available, although handicapped by a progressive impairment in his hearing (R. 44-46, 53, 100). Except for this impairment, however, there was no indication that his health was not generally good.

At the close of all the evidence the defendant moved the court to direct a verdict in its favor

upon the following grounds: (1) that there was no substantial evidence (a) of total permanent disability, or (b) of loss of hearing of both ears, within the meaning of paragraph 11 (a) of the policy; (2) fraud (a) in reinstatement of the war risk insurance, and (b) in the conversion of the reinstated insurance to Government life insurance (R. 127–128). The defendant excepted to the denial of this motion (R. 129) and to the rulings of the court on instructions given and requested as to the defense of fraud (R. 130–131, 140), and as to the relevancy *vel non* of the plaintiff's ability to hear with artificial aids (R. 138, 139). The trial court instructed the jury with reference to paragraphs 11 and 11 (a) of the policy, in effect that they should render a verdict for the plaintiff and find that he was totally and permanently disabled if they found that he was either totally and permanently deaf *or* totally and permanently disabled *in fact* (R. 135–137).

The jury rendered a verdict for the plaintiff and found that he "became permanently and totally disabled December 1st, 1932" without indicating whether their finding was based upon permanent total disability in fact or merely upon his deafness without regard to its disabling effect (R. 10). From a judgment entered upon this verdict (R. 11–13) the defendant appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 143–159) assigning error *inter alia* to the court's in-

struction to the jury that recovery might be allowed under clause 11 (a) of the policy which the defendant contended had been placed therein without authority of law (R. 148, 149). The Circuit Court of Appeals affirmed the judgment below on the ground that paragraph 11 (a) of the policy was valid; that the decision of this Court in *Miller* v. *United States,* No. 342, October Term, 1934, decided March 4, 1935, affirming the decision of that Court (71 F. (2d) 361) was inapplicable; and that as the evidence justified a finding that the insured had suffered loss of hearing sufficient to justify recovery under paragraph 11 (a) of the policy [2] it was unnecessary to determine whether there was substantial evidence of permanent total disability in fact within the meaning of the general definition thereof contained in paragraph 11 (R. 29). The court also held that the trial court did not err in withdrawing the issue of fraud from the jury.[2]

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in declaring valid the provision in paragraph 11 (a) of the Government life insurance contract that the permanent loss of hearing of both ears shall be deemed to be total disability.

2. The Circuit Court of Appeals erred in holding that the decision of this Court in *Miller* v.

[2] The Government does not question the correctness of the court's decision in these two respects.

United States, No. 342, October Term, 1934, decided March 4, 1935, is without application to this case.

REASONS FOR GRANTING THE WRIT

In *Miller* v. *United States, supra,* this Court held that the provisions with respect to yearly renewable term insurance contained in Article IV of the Act of October 6, 1917 (c. 105, 40 Stat. 398, 409) limited the risk to be covered in respect to total permanent disability to disabilities which are total and permanent in fact, and held invalid, as not within the authority conferred by the statute, Regulation 3140 of the Veterans' Administration, which purported to add to the disability risk by declaring that certain disabilities, including loss of hearing of both ears, shall be deemed to be total and permanent under yearly renewable term insurance without regard to proof of that fact.[3] Although the language in this regulation is identical (except for the addition of another disability)[4] with that in paragraph 11 (a) of the Government life (converted) insurance policy here in suit, and all the statutory provisions construed in that case related to Government life insurance as well as to yearly renewable term insurance, the court below has attempted to distinguish that case from the one at bar on the ground that paragraph 11 (a) was authorized by the gen-

[3] The clause invoked in the *Miller* case was "the permanent loss of the use of * * * one hand and one eye."

[4] Regulation 3140 adds "the organic loss of speech."

eral language in certain provisions of the statute which, it seems to have been assumed, applies to Government life insurance alone. But the soundness of this distinction is by no means clear when this language is construed in the light of its context and of the effect which additions to the disability risk to be covered by this insurance would have upon other purposes manifest in the statute.

The clauses in question appear in U. S. C. Sup. VII, Title 38, sec. 512, and provide:

> * * * not later than July 2, 1927, all term yearly renewable insurance * * * shall be converted, * * * into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, * * *.
>
> * * * * *
>
> Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up, and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *

Except as to the time limited for conversion of yearly renewable term insurance, the same language appears in the Act of October 6, 1917, and all subsequent legislation on this subject.[5]

This Court has held that general words which follow or precede words descriptive of particular subjects having common characteristics should be construed as limited to subjects of like kind with those described by the particular words unless there is a clear manifestation to the contrary. *United States* v. *Stever,* 222 U. S. 167, 174. Applying this rule to the clauses under construction here, the general phrases, "such form or forms of insurance as may be prescribed by regulations and as the insured may request" and "other usual forms of insurance", should be construed as limited to subjects like those described by the particular phrases "ordinary life, twenty-payment life", etc., which follow and precede them, respectively, and describe several different forms of life insurance.

Similarly, the general clause "such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and prac-

---

[5] Acts of June 25, 1918, c. 104, sec. 19, 40 Stat. 609, 615; August 9, 1921, c. 57, sec. 24, 42 Stat. 147, 155; June 7, 1924, c. 320, sec. 301, 43 Stat. 607, 624; March 4, 1925, c. 553, sec. 13, 43 Stat. 1302, 1309; June 2, 1926, c. 449, 44 Stat. 686, 687; May 29, 1928, c. 875, sec. 14, 45 Stat. 964, 968, 969; July 3, 1930, c. 849, sec. 22, 46 Stat. 991, 1001.

ticable" should be construed as limited to subjects like those described by the particular words "maturity at certain ages", "refund of premiums, cash, loan, paid-up, and extended values", etc., which immediately preceded the general clause in the same sentence and all of which describe certain provisions commonly contained in life insurance contracts. This construction is further supported by the fact that the Congress, before passing the Act of October 6, 1917, struck out of the corresponding general clause contained in Section 402 of the bill as originally introduced, a provision authorizing the Director of the Veterans' Bureau to grant "rights and privileges not provided for." (See H. Rep. No. 130, 65th Cong., 1st Sess., part 3, p. 12.)

The reasons stated by this Court for its decision in the *Miller* case apply with equal force to the case at bar. Indeed, there is even less reason for supposing that Congress intended to authorize additions to the disability risk covered by Government life insurance than for imputing such an intent as to yearly renewable term insurance. The premium rate for both was limited to that for the mortality hazard (U. S. C. Sup. VII, Title 38, sec. 511), no increase being authorized to cover the additional risk of disability. But Government life insurance differs from yearly renewable term insurance in that it is intended to be self-sustaining if possible. By Section 18 of the Act of December 24, 1919, c. 16, 41 Stat. 376, Congress established the

United States Government Life Insurance Fund which was to consist exclusively of premiums on such insurance and to be invested and administered separate and apart from funds derived from yearly renewable term insurance.[6]

It was further provided that this fund should be available to meet all liabilities on account of Government life insurance (except "the expenses of administration and the excess mortality and disability cost resulting from the hazards of war" which were borne by the United States (Sec. 403, War Risk Insurance Act, as amended October 6, 1917, c. 105, 40 Stat. 410, U. S. C. Sup. VII, Title 38, sec. 511)), and, to that end, the Bureau was authorized "to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance."[7] It was no doubt anticipated that a large part of such liabilities would consist of permanent total disability benefit payments, especially since the contract provided no maximum age limit for those entitled to them. Obviously, the efforts of the Bureau to administer the fund so as to "meet all liabilities" might be seri-

[6] Prior to this Act Government life insurance premiums had been deposited in the military and naval insurance appropriation fund together with those paid for yearly renewable term insurance. (Sec. 20, added to the War Risk Insurance Act by the Act of October 6, 1917, 40 Stat. 400.)

[7] Substantially similar provisions are contained in the statute today. U. S. C., Title 38, Sec. 443.

ously hampered by the assumption of any more gratuitous risks and plain language should therefore be required to justify construing the statute as authorizing such an assumption. There would seem to be no such language contained in the statute.

Even were it assumed that the Director of the Veterans Bureau (or his successor, the Administrator of Veterans Affairs) was authorized to make the total permanent disability provisions in Government life insurance contracts conform to those usually found in commercial insurance policies regardless of the burden thus gratuitously undertaken, there would, nevertheless, seem to be no justification for including a provision making the loss of hearing of both ears presumptive total permanent disability. Such a clause is not only not in general use, but no policy containing it has come to our attention. See Amrhein's *The Liberalization of the Life Insurance Contract,* 1933, pp. 282–283, 361–363 (pars. (8) and (16); and Cf. *The Handy Guide to Standard and Special Contracts,* 1934 (The Spectator Company).

The question of whether or not the presumptive total permanent disability clause in the policy here in suit is valid is, we submit, an important one. Such clauses are contained in all the Government life insurance policies now outstanding[8] which, at

[8] See history of these clauses contained in brief of Veterans' Administration filed in the *Miller* case, pp. 12–21.

the close of the fiscal year 1934, numbered nearly six hundred thousand.[9] Moreover, it may be assumed that many more will be issued from time to time to those entitled to apply for them (U. S. C. Sup. VII, Title 38, secs. 511, 512a). The same provision (with the addition of "the organic loss of speech") is contained in Veterans' Administration Regulation No. 3122, *infra*, p. 17.

In view of the apparent error of the court below, we consider it our duty to seek a review of its decision in order that present and future policy holders may not be misled as to the nature and extent of the disability benefits provided in their contracts.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

JULY 1935.

---

[9] Report of Administrator of Veterans' Affairs for 1934, p. 29.

APPENDIX

Statutes and Regulations Involved

Pertinent sections of the War Risk Insurance Act, as amended, provide in part as follows:

> Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *. (May 20, 1918, c. 77, 40 Stat. 555.)
>
> Sec. 18. That all premiums paid on account of insurance converted under the provisions of Article IV of the War Risk Insurance Act shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance. Payments from this fund shall be made upon and in accordance with awards by the director.
>
> The Bureau of War Risk Insurance is hereby authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance

fund, or any part thereof, in interest-bearing obligations of the United States and to sell the obligations for the purposes of the said fund. (December 24, 1919, c. 16, 41 Stat. 371, 376.)

SEC. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director (October 6, 1917, c. 105, 40 Stat. 398, 400).

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided (October 6, 1917, c. 105, 40 Stat. 398, 409).

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * * (June 25, 1918, c. 104, sec. 21, 40 Stat. 609, 615.)

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum. (October 6, 1917, c. 105, 40 Stat. 398, 410.)

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life,

endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election. (October 6, 1917, c. 105, 40 Stat. 398, 410.)

Veterans' Administration Regulations

Definition of total permanent disability

3121. Total permanent disability as referred to in a United States Government life-insurance policy, is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of total permanent disability and any permium paid after receipt of due proof of total permanent disability and within the six months shall be refunded without interest.

Statutory total permanent disabilities

3122. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or

the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

U. S. GOVERNMENT PRINTING OFFICE: 1933